

No. 398.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

THE SOUTHERN PACIFIC RAILROAD
COMPANY,

Appellant,

vs.

OTTO GROECK AND C. S. MERRILL, JR.,

Appellees.

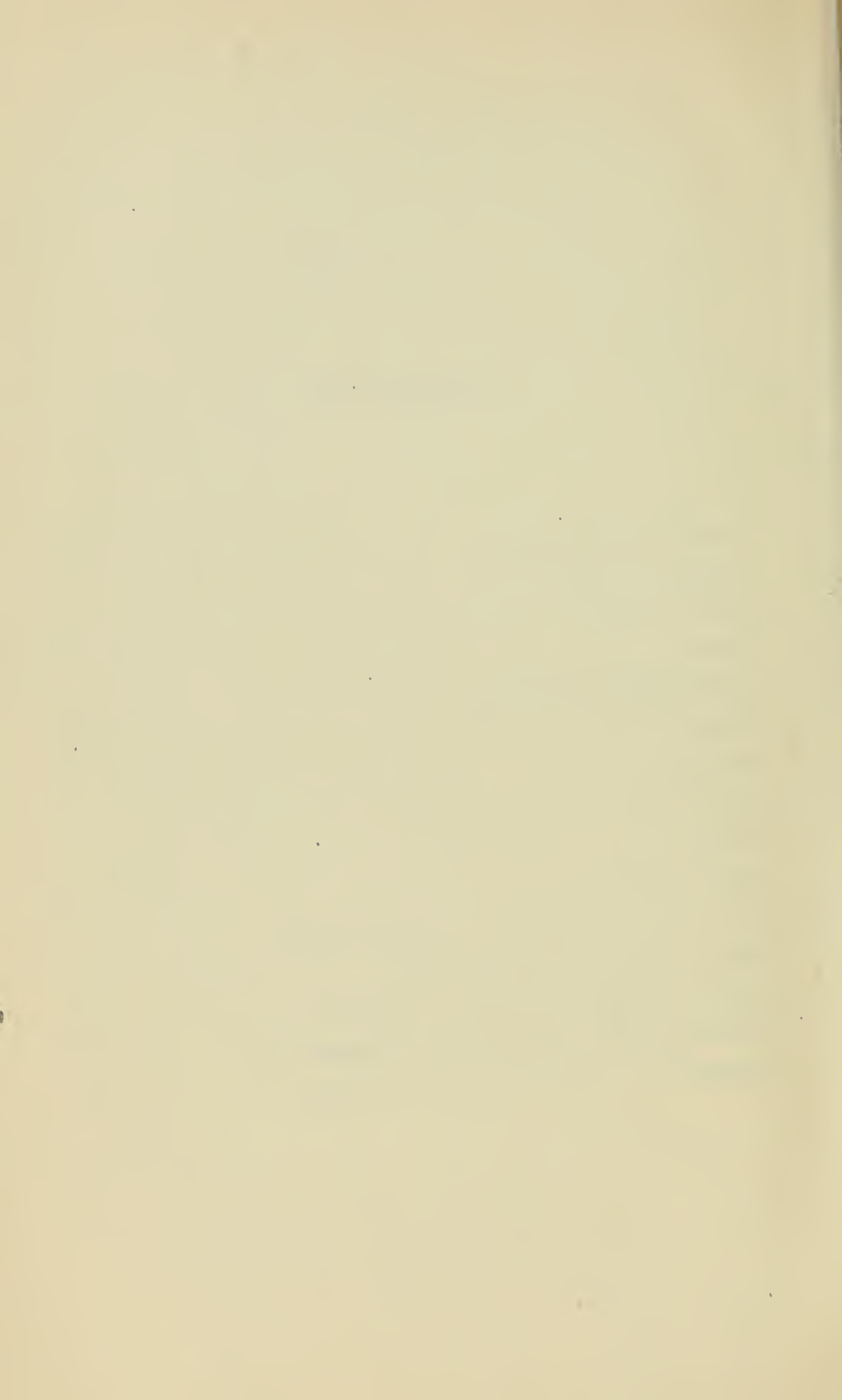
TRANSCRIPT OF RECORD.

Appeal from the Circuit Court of the United States
for the Southern District of California.

FILED
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Citation.

United States of America, }
Southern District of California. }

To Otto Groeck and C. S. Merrill, Jr., Greeting :

The Southern Pacific Railroad Company having, on this day, been granted an order of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree entered on June 28th, 1897, in suit No. 347 in the Circuit Court of the United States for the Southern District of California, brought by the said Company against you ; and its bond on appeal having been this day filed and approved :

You are hereby cited and admonished to be and appear before the said Circuit Court of Appeals, at San Francisco, California, on September 21st, 1897, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Los Angeles, in the said District, on August 24th, 1897.

ROSS,
Circuit Judge.

Served on me, August 30th, 1897.

W. B. WALLACE,
Attorney for Otto Groeck and C. S. Merrill, Jr.

[Endorsed]: Citation. Filed Sept. 3, 1897. Wm.
M. Vandyke, Clerk.

*In the Circuit Court of the United States, Ninth
Circuit, Southern District of California.*

THE SOUTHERN PACIFIC RAIL- ROAD COMPANY,	} Plaintiff,	} In Equity.
vs.		
OTTO GROECK and C. S. MER- RILL, Jr.,	} Defendants. }	

Amended Bill of Complaint.

The Amended Bill of Complaint of the Southern Pacific Railroad Company, Plaintiff, against Otto Groeck and C. S. Merrill, Jr., Defendants. Filed by leave of the Court.

To the Honorable Judges of the Circuit Court of the United States for the Ninth Circuit, Southern District of California :

Your orator, the Southern Pacific Railroad Company, complaining says :

I.

That your orator is, and at all the times hereinafter mentioned, was a private corporation, duly incorporated by and in virtue of the general laws of the State of California, and a citizen of said State ; and Otto Groeck and C. S. Merrill, Jr., Defendants. Each is a citizen of the State of California and inhabitant of the Southern District of California.

II.

The matter in dispute in this suit exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and, as will be hereinafter shown, arises under the laws of the United States.

III.

By an Act of the Congress of the United States, approved July 27th, 1866, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast," your orator was authorized and empowered to connect with the Atlantic and Pacific Railroad at such point near the boundary line of the State of California as they should deem most suitable for a railroad line to San Francisco, and to construct a railroad from such point to the city of San Francisco.

To aid in the construction of the said railroad, the said Act of the Congress made a grant to your orator of every alternate section of public land, not mineral,

designated by odd numbers, to the amount of ten alternate sections of land per mile on each side of said railroad when constructed. And in this behalf the said Act further provided that, whenever prior to said time, any of the said sections were granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands should be selected by your orator in lieu thereof, under the direction of the Secretary of the Interior, from the odd-numbered sections not more than ten miles beyond the limits of the first mentioned odd-numbered sections. The said Act, among other matters, further provided (by Section 6 thereof) that the President of the United States should cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route should be fixed, and as fast as might be required by the construction of said railroad; and that the odd sections of land thereby granted should not be liable to sale or entry, or pre-emption, before or after they were surveyed, except by your orator, as provided in the said Act.

Your orator refers to the said Act of the Congress, as printed in the XIV U. S. Statutes at Large, at page 292 and following; and makes the said Act, and the whole thereof, a part of this Bill of Complaint.

The Act of the Congress, approved July 25th, 1868, entitled "An Act to Extend the Time for the Construction of the Southern Pacific Railroad in the State of California," provided that your orator have until July 1st, 1870, for the construction of the first thirty

miles of said railroad; that it be required to construct at least twenty miles every year thereafter, and the whole line of road within the time then provided by law—namely, on or before July 4th, 1878.

IV.

On December 27th, 1866, your orator duly accepted the terms, conditions and impositions of the said Act of July 27th, 1866, and deposited such acceptance in the office of the Secretary of the Interior; which acceptance was in writing, under its corporate seal, and was duly executed pursuant to the direction of its board of directors, theretofore made.

V.

On or before January 3d, 1867, your orator duly filed the general route of the entire line of the railroad which it was authorized by the said Act of July 27th, 1866, to construct, and on January 3d, 1867, the line of the said road was designated by a plat thereof filed on that day in the office of the Commissioner of the General Land Office. The said general route, plat and designation of line, were duly approved and accepted by the Secretary of the Interior and the Commissioner of the General Land Office; and, on March 22d, 1867, the Commissioner of the General Land Office, by direction of the Secretary of the Interior, dated March 19th, 1867, withdrew the odd-numbered sections of land within thirty miles of the railroad line shown upon the said plat, from sale or

location, pre-emption or homestead entry. A copy of the said order of March 22d, 1867, is hereto attached, marked "Exhibit A," and made a part of this Amended Bill.

The said order of withdrawal has ever since continued and still continues in full force and effect, except in so far as, if at all, the same may have been affected by orders of the Secretary of the Interior dated, respectively, November 2d, 1869, directing restoration of the said lands, and August 15th, 1887, directing restoration of all lands withdrawn and held for indemnity purposes under the said grant to your orator. Your orator is advised and believes, and therefore says, that neither the said order of November 2d, 1869, nor the said order of August 15th, 1887, in anywise affected the provisions of the Sixth Section of the said Act of July 27th, 1866; and that the said orders did not, and could not, make the said lands in anywise liable to sale, entry or pre-emption, except by your orator.

The said order of November 2d, 1869, directing restoration of the said lands, was indefinitely suspended by the order of the Secretary of the Interior, dated December 15th, 1869.

On June 28th, 1870, a Joint Resolution was adopted by the Congress of the United States, entitled "Joint Resolution Concerning the Southern Pacific Railroad of California," approved June 28th, 1870; which Joint Resolution is printed in the 16th Statute at Large;

page 382, and is hereby referred to and made a part of this Amended Bill.

On July 26th, 1870, and July 29th, 1870, respectively, the Secretary of the Interior and the Commissioner of the General Land Office ordered and directed that the order of the Commissioner of the General Land Office of March 22d, 1867, hereinbefore referred to, should be respected; a copy of each of which orders is hereto attached, marked respectively, "Exhibit B" and "Exhibit C," and made a part of this Amended Bill.

VI.

Your orator constructed the first section of its railroad, extending from San Jose, in a southerly direction, through the town of Gilroy, to a point distant more than thirty miles from San Jose, prior to July 1st, 1870; and, within the next year thereafter, constructed the twenty mile section of said railroad extending from the last mentioned point to Tres Pinos. Thereafter, and prior to July 4th, 1878, your orator constructed that portion of its railroad extending from Huron to Mojave, a distance of one hundred and eighty-two miles; and constructed its railroad extending from Mohave to the Needles, where it connects with the Atlantic and Pacific Railroad, in several sections, and at different times, subsequent to July 4th, 1878, and prior to the year 1885; and constructed the section of said railroad which extends from Huron westerly to Alcalde during the year 1888.

All of said railroad was constructed along the line designated therefor on the said plat of general route, filed January 3d, 1867.

All of the said railroad was so constructed and equipped in a good, substantial and workmanlike manner, in all respects as required by the said Acts of the Congress. Commissioners, duly appointed by the President of the United States, examined the said railroad after it was completed in sections as aforesaid, and duly reported to the President of the United States that all of the said railroad had been completed in a good, substantial and workmanlike manner, in all respects as required by the said Acts of the Congress.

The President of the United States duly accepted and approved the said reports, as follows: Of the first thirty-miles section of railroad, extending from San Jose through Gilroy, on August 7th, 1871; of the second section of railroad, extending from near Gilroy to Tres Pinos, on October 26th, 1871; of the several sections extending from Huron to Mojave, at various dates between October 26th, 1871, and January 31st, 1878; and the section of railroad extending from Huron westerly to Alcalde, on November 8th, 1889.

VII.

Your orator filed plats in the General Land Office and Department of the Interior, showing the line of its said railroad as definitely located and constructed, on the following dates: Of the first thirty-miles section

of railroad, extending from San Jose through Gilroy, on August 7th, 1871; of the section of railroad extending from near Gilroy to Tres Pinos, on October 26th, 1871; of the several sections of railroad extending from Huron to Mojave, at various dates between October 26th, 1871, and January 31st, 1878; of the several sections of railroad extending from Mojave to the Needles, at various dates between January 31st, 1878, and December 31st, 1884; and of the section of railroad extending from Huron westerly to Alcalde, on April 2d, 1889.

VIII.

The east half of the south-west quarter of Section 19, in Township 8 South, Range 1 East, Mount Diablo Base and Meridian, is part of an odd-numbered section, within twenty miles, on the west side, of the first section of the said railroad, which extends from San Jose through Gilroy. The said tract was granted to the Central Pacific Railroad Company of California, by the Act of the Congress of the United States approved July 1st, 1862, entitled "An Act to aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for Postal, Military and other purposes," prior to the time when your orator's railroad was designated by a plat thereof filed in the office of the Commissioner of the General Land Office; which Act is printed in the XII U. S. Statute at Large, at page 489 and following.

IX.

The south half of the south-east quarter of Section 17, in Township 24 South, Range 17 East, Mount Diablo Base and Meridian, is situated in Kings County, and within the Southern District of California.

The said tract is part of an odd-numbered section, distant more than twenty miles from, but lying within thirty miles of, the line of road designated on the said plat thereof filed January 3d, 1867, and the said road as definitely located and constructed; and is opposite to and co-terminous with the section of said railroad which extends from Huron westerly to Alcalde.

At the time of the passage of the said Act of July 27th, 1866, the tract of land last described was vacant and unappropriated public land of the United States, not mineral, to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emptions or other claims or rights; and the said land has ever since so remained, excepting only as it has been affected by the laws of Congress and the acts of the parties in this Amended Bill mentioned and referred to.

Each of the tracts of land hereinbefore particularly described is situated within the United States district of lands subject of sale and proceedings at Visalia, in the State of California.

X.

On July 13th, 1891, your orator filed its Indemnity List, No. 43, in the Land Office of the United States at Visalia, describing the said south half of the said south-east quarter of Section 17, in Township 24 South, Range 17 East, Mount Diablo Base and Meridian, as selected by your orator in lieu of the said east half of the south-west quarter of Section 19, in Township 8 South, Range 1 East, Mount Diablo Base and Meridian. The said list was in the form, and accompanied by the certificates, affidavits and fees required by law and the rules and regulations prescribed by the Secretary of the Interior and Commissioner of the General Land Office of the United States; and, by the filing of the said list, accompanied as aforesaid, your orator did, on July 13th, 1891, duly select, under the direction of the Secretary of the Interior, the said south half of the south-east quarter of Section 17, in Township 24 South, Range 17 East, in virtue of the rights aforesaid, granted to it by the said Act of July 27th, 1866. That on July 13th, 1891, your orator had not, nor has it since, selected or received lands to the extent or amount earned and acquired by it, in virtue of the said Act of Congress.

By and in virtue of the grant made by the said Act of July 27th, 1866, the provisions of the said Act, and the matters and things hereinbefore set forth, on July 13th, 1891, your orator became the owner of, and entitled to the issue from the United States to it of a

patent for the south half of the south-east quarter of the said Section 17, and thereafter the holder of the legal title to the said land, whoever it might be, held the same in trust for your orator, and under the obligation to convey the same to it upon demand; and your orator at that time, and continuously thereafter until the commencement of this suit, duly demanded the issuance of such patent from the United States to it. But, notwithstanding such right, title and demand, the Commissioner of the General Land Office, the Secretary of the Interior, and the President of the United States, each has, and all have, refused to issue a patent conveying the said land to your orator.

XI.

Notwithstanding the premises, the United States, on or about April 11th, 1890, in disregard of the rights in respect of said land theretofore acquired by your orator, executed and delivered its patent, conveying the legal title to said land to the said defendant, Otto Groeck; and thereafter, and on or about April 11th, 1891, the said Otto Groeck executed a deed, bearing that date, conveying the same to the defendant, C. S. Merrill, Jr.; and the defendants claim, and each of them claims, that the said patent, so issued by the United States, conveyed the said land in fee simple to the defendant, Otto Groeck, free from any trust, in favor of your orator, and that the said deed from the said Otto Groeck to the said C. S. Merrill, Jr., conveyed the said land in fee simple to the said C. S. Merrill, Jr., free from any

trust in favor of your orator. But, as your orator is informed and believes, such claims are made by the said defendants upon the following grounds and allegations, and none others, that is to say: That on or about September 17th, 1885, the said defendant, Groeck, filed, in the United States Land Office at Visalia, his pre-emption declaratory statement for the said land, alleging therein that he settled on said land September 2d, 1885, as a pre-emptor, and that, on June 7th, 1886, the said Groeck was permitted to, and did, make proof, in the United States Land Office at Visalia, that he was a qualified pre-emptor at the time he settled upon the said lands, that he settled thereon September 2d, 1885, and improved the land and resided on it continuously from the time of his settlement to the date of the proof, and that on the day when said proof was made he was permitted to make pre-emption, entry and payment for the said land, and that such proceedings were thereafter had in the Visalia Land Office, and in the General Land Office, and in the Department of the Interior of the United States, as resulted in the issue of the patent to said Groeck, above set forth.

But your orator alleges that, even if such allegations so made on behalf of the defendants should be found to be in any respect correct and true, the same did not in anywise authorize or justify the issue of said patent to said Groeck; that if the said Groeck did, in fact, settle upon said land as alleged, or file any pre-emption declaratory statement for the said land, or make any such proofs as alleged, or was per-

mitted to or did make pre-emption, entry or payment for the said land, the fact is, that at all such times said land, and the whole thereof, was withdrawn from sale or location, pre-emption or homestead entry, under and by virtue of the order of March 22d, 1867, hereinbefore referred to, and subsequent orders confirming or reinstating the same; and that said land has not, at any time since the 3d day of January, 1867, or, in any event, since the 28th day of June, 1870, been in anywise liable to sale, entry or pre-emption; but sale, entry and pre-emption thereof has been expressly prohibited by law, which facts were well known to the said Groeck at and at all times since the date of any settlement, or alleged settlement, by him upon the said lands, and by the said Merrill at and prior to the time of the conveyance of said land to him by the said Groeck; and the said Groeck and Merrill acquired the title to said land only in trust for your orator, and subject to the obligation to convey to it on demand.

XII.

After the said patent issued from the United States, and prior to the said pretended conveyance by Otto Groeck to C. S. Merrill, Jr., your orator requested the defendant, Otto Groeck, to convey the title which he had received to the said land, to it; and thereafter, and prior to the commencement of this suit, requested each of the defendants to convey such title to it; but each of the defendants has, at all times, refused so to do.

XIII.

Your orator further says that it is the true owner of the title to the south half of the south-east quarter of Section 17, in Township 24 South, Range 17 East, Mount Diablo Base and Meridian; and that the afore-said patent conveying the same to the defendant, Otto Groeck, was wrongfully issued, without authority of law, in disregard of your orator's rights in the premises. That the said patent conveyed the legal title to the said land to the defendant, Otto Groeck, but in trust, however, for your orator, of which the defendant, C. S. Merrill, Jr., had full knowledge at the time he received said Deed pretending to convey title to said land to him; and that the defendants should convey to your orator the title so held by them in and to the said land, free of encumbrances.

That your orator is remediless in the premises, at and by the strict rules of the common law, and can only have relief in a Court of Equity, where matters of this nature are properly cognizable.

To the end, therefore, that the said Otto Groeck and C. S. Merrill, Jr., and each of them, may full and perfect answer make to all and singular the facts and matters herein set forth (but not upon oath or affirmation, the benefit of which is waived by your orator); and that it may be declared that your orator is the rightful owner of the said land, and that the defendants hold the legal title thereto in trust for your orator; and that it be decreed that the defendants convey such legal title

free of all encumbrances made, done, or suffered by them or either of them, to your orator; and that your orator may have such further or other relief as the nature of this case may require, and to your Honors shall seem meet.

May it please your Honors to grant unto your orator a Writ of Subpœna, to be directed to the said Otto Groeck and C. S. Merrill, Jr., the defendants herein, thereby commanding them and each of them, at a certain time, and under a certain penalty therein to be limited, to personally appear before your Honors, and then and there full, true, direct and perfect answer make to all and singular the premises; and to stand to, perform and abide such further order, direction and decree therein as to your Honors shall seem agreeable to equity and good conscience.

WM. SINGER, JR.,
Attorney for the Plaintiff.

WM. F. HERRIN,
Counsel for the Plaintiff.

“ Exhibit A.”

Department of the Interior,
General Land Office,
March 22nd, 1867.

Register and Receiver,
Visalia, Cal.

Gentlemen :

The Secretary of the Interior has transmitted to this office a map of the designated line of route of the South-

ern Pacific Railroad of California, and directed the withdrawal of the lands granted thereto under the Act of 27 July, 1866—pamphlet laws 1866, page 299. The grant to this road is found in the 18th section of the above Act; by that section this Company is granted every *alternate* or *odd* numbered section of public land for *10 sections* in width on each side of the line of route and indemnity for lands, sold, reserved or otherwise appropriated, within the grant from the alternate odd sections of unappropriated public land not “more than *10 miles* beyond the limits of the granted sections.” The limits of the *grant* then are *20 miles* on each side of the road and of the *indemnity* *30 miles* on each side.

In compliance with the Secretary's instructions I herewith enclose a diagram map, having noted thereon that part of the line of route within the *20* and *30 mile* limits which fall within the limits of your district, and you are hereby directed to withdraw from sale or location Pre-emption or Homestead entry *all the* odd sections within said limits, and no entries will be allowed thereon after the receipt of this order *except where bona fide pre-emption claims have attached prior to that time.* The even sections within the twenty limits will, by virtue of the Act of March 3rd, 1853, be increased to \$2.50 per acre, and subject to the provisions of the Pre-emption and Homestead laws at *that price, except where pre-emption rights may have attached prior to this withdrawal;* in such cases then parties may prove up and pay for their claims *at the price they were held on the*

date of settlement. The even sections within the 20 miles *will not* be subject to private entry until duly offered at the increased price.

By the 6th section of the Act, the provisions of which are extended to the South Pacific road by the 18th section, the unsurveyed lands within 40 miles on each side of the line of route are directed to be surveyed, and the odd sections of land *granted* by the Act "shall not be liable to sale or entry" or pre-emption *before or after they are surveyed*, "except by said Company as provided in this Act;" therefore as plats of surveys *within the limits of the grants* may be filed in your office, you will immediately withdraw the *odd*-sections from pre-emption or entry of any kind and hold the same for the benefit of the road.

This order will take effect from the date of its reception, and you will please to acknowledge the date of its receipt by you.

Respectfully,

Your obdt. Svt.,

JOS. S. WILSON,

Commissioner.

Also the Reg. and Rec. at Stockton, Cal., and San Francisco, Cal.

“Exhibit B.”

Department of the Interior,
Washington, D. C., July 26, 1870.

Sir :

Referring to my letter of the 15th of December last, directing you to suspend, until further advised by this Department, all action under my decision of November 2nd and 11th, 1869, ordering the restoration of lands withdrawn on account of the Southern Pacific Railroad Company of California, I have now to inform you that by a joint resolution of Congress, approved June 28th, 1870, the said Company are authorized to construct their road and telegraph line, as near as may be, on the route indicated by the map filed in this Department January 3, 1867, and will, upon constructing their road and telegraph line on that route, in compliance with the provisions of the Act of July 27, 1866, be entitled to patents for the granted lands.

You will advise the proper local officers of this legislation, that the reservation of 1867, on account of the Company, may be respected.

Very respectfully,

Your obedient servant,

J. D. COX,
Secretary.

Hon. J. S. WILSON,
Commissioner of the General Land Office.

“Exhibit C.”

Department of the Interior,
 General Land Office,
 July 29, 1870.

Register and Receiver,
 San Francisco, Cal.

Gentlemen :

The Secretary of the Interior having informed this office that by a joint resolution (copy herewith inclosed) of Congress, approved June 28, 1870, the Southern Pacific Railroad Company of California are authorized to construct their road and telegraph line, as near as may be, on the route indicated by the map filed in this Department January 3, 1867, a copy of which was sent you on the 22nd of March, 1867, I have to direct that the reservation as indicated in that letter be respected.

Please acknowledge receipt.

Yours respectfully, &c.,

JOS. S. WILSON,
 Commissioner.

[Endorsed]: No. 347. U. S. Circuit Court, Ninth Circuit, Southern District of Cal'a. S. P. R. R. Co. vs. Otto Groeck and C. S. Merrill, Jr. Amended Bill of Complaint. Filed July 6, 1896. Wm. M. Van Dyke, Clerk. Wm. Singer, Jr., rooms 61-2, Union Trust Building, San Francisco, Cal., Atty. for Plaintiff.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

THE SOUTHERN PACIFIC RAIL-	}
ROAD COMPANY,	
	Complainant,
	vs.
OTTO GROECK and C. S. MER-	}
RILL, Jr.,	
	Respondents.

Plea of Respondents to Amended Bill of Complaint.

The above named respondents, by protestation, not confessing or acknowledging all or any of the matters or things in the said Bill of Complaint mentioned to be true in such manner and form as the same are therein set forth and alleged, do jointly and severally plead thereto, and for plea say :

The respondents allege that on or about the 15th day of August, 1887, the Secretary of the Interior made and entered in his records an order revoking and annulling all orders previously made reserving lands within the indemnity limit of all and every grant made to the Southern Pacific Railroad Company, and restoring them to the public domain, except so far as had theretofore been lawfully selected by said Southern Pacific Railroad Company; that from the date of said Act of Congress of July 27th, 1866, down to July 13th, 1891, the Southern Pacific Railroad Company did not

select, or apply to select, the land involved in this suit as indemnity land under the direction of the Secretary of the Interior, or otherwise.

Respondents further allege, that on the 2nd day of September, 1885, respondent Groeck settled upon said land, and on the 7th day of September, 1885, filed his pre-emption declaratory statement for said land in the United States Land Office, in the Visalia Land District, being the district in which the said land is situated, and thereafter applied to the Register and Receiver of said United States Land Office to make final proof under said pre-emption law and the regulations of the Interior Department, and gave due notice as required by law and the said regulations that he would make such final proof on the 7th day of June, 1886; and on said 7th day of June, 1886, said Groeck was permitted to, and did, make proof in the United States Land Office at Visalia, that he was a qualified pre-emptor at the time he settled upon said land; that he settled thereon September 7th, 1885, and improved the land and resided upon it continuously from the time of his settlement to the date of his proof; and at the time and place of making such proof complainant did not appear and assert any claim to, or interest in, said land; and on the day when said proof was made said respondent was permitted to, and did make, pre-emption entry and payment for said land, and then and there said respondent received from the Register and Receiver of said Land Office a final certificate for said land in due form of law, and thereafter, on or about

April 11th, 1890, a patent was duly and regularly issued by the United States to respondent Groeck for said land; that thereafter complainant, on July 13, 1891, applied to select said land, as alleged in its amended bill, by filing its List No. 43 in the United States Land Office at Visalia, California; but said application was rejected, and the selection of said land by complainant disallowed by the said Register and Receiver, and an appeal from their decision was dismissed by the order of the Commissioner of the General Land Office, and no appeal from the said order of dismissal has been taken by said complainant.

Respondents allege, that by reason of the facts hereinbefore set forth, the issuance to the respondent Groeck of said patent for said land vested in said respondent Groeck a perfect and legal title in fee simple to said land; and, in any event, complainant by its long delay in asserting any claim to said land, in filing its map of definite location, and in offering to select said land, is barred by its laches from asserting any claim thereto.

All of which matters and things these respondents aver to be true and plead the same to the said bill, and pray the judgment of this Honorable Court whether they, or either of them, ought to be compelled to make any further or any answer to the said bill.

W. B. WALLACE,
Solicitor for Respondents.

J. H. CALL,
Of Counsel.

I hereby certify that the foregoing plea is in my opinion well founded in point of law.

W. B. WALLACE,
Solicitor for Respondents.

[Endorsed]: No. 347. In the United States Circuit Court, Southern District of California, Ninth Circuit. Southern Pacific Railroad Company, Complainant, vs. Otto Groeck and C. S. Merrill, Jr., Respondents. Plea of Respondents to Amended Bill of Complaint. Service hereof admitted on behalf of Complainant this 15th day of August, 1896, and verification waived. Wm. Singer, Jr., Attorney for Complainant. W. B. Wallace and J. H. Call, Solicitors for Respondents, Visalia, Cal. Filed Aug. 19, 1896. Wm. M. Van Dyke, Clerk, by E. H. Owen, Deputy.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

THE SOUTHERN PACIFIC RAIL-	}
ROAD COMPANY,	
Complainant,	}
vs.	
OTTO GROECK, et al.,	
Defendants.	}

Opinion on Plea.

To the original bill in this case a demurrer was sustained upon the ground that the bill showed upon its

face such *laches* on the part of the complainant as precluded it from the recovery sought. (Southern Pacific Railroad Co. vs. Groeck, et al, 68 Fed. Rep., 609-617). Leave was, however, given the complainant to amend its bill, and accordingly it filed an amended bill, to which the respondents interposed a plea, which the complainant caused to be set down for argument, and which has been argued, and is now for disposition. For the purpose of disposing of the plea, the Court must assume, without proof on either side, the facts to be as set out in the bill, where not controverted by the plea, and, where so controverted, or inconsistent, to accept as true the contradictory and inconsistent allegations of the plea, together with such additional facts as are therein set out. (United States vs. California Land Co., 148 U. S., 31-39; Farley vs. Kittson, 120 U. S., 304-314; Rhode Island vs. Massachusetts, 14 Pet., 253-258.)

The case as now presented is not, in my opinion, as strong for the complainant as when it was last under consideration. As now presented, it shows that, notwithstanding the grant to the complainant, under which it claims the piece of land in controversy, was made by Congress July 27, 1866, (14 Stats., 292,) and that the complainant, on or before the 3d day of January, 1867, located the general route of the road it was authorized to build by the Act making the grant, and filed with the Secretary of the Interior a map on that day showing the general route of the road as located, which map was accepted by the Secretary, and on the

same day transmitted by him to the Commissioner of the General Land Office, to be filed in that office, which was done on the same day, yet the complainant did nothing towards definitely locating that portion of its road opposite the land in controversy prior to the year 1888, and never attempted to select the land in controversy until December 31, 1891, for which long delay the bill as amended affords no excuse. It appears from the bill as amended that the piece of land in controversy, which is within the indemnity limits of the grant, is opposite that section of the complainant's road extending from Huron westerly to Alcalde, and that that portion of the road was not constructed until the year 1888, and that the complainant never filed a plat in the General Land Office showing the definite location of that portion of its road until April 2, 1889—years after the defendant Groeck went upon the land claiming the right of settlement, and had been allowed by the officers of the Land Department to enter and pay for it, and but little more than one year before the government issued to him his patent therefor. True, the land was not, at the time, subject to Groeck's settlement, for the reason that it then stood withdrawn from such settlement or sale for the benefit of the complainant; but the complainant was then sleeping upon its rights, and continued to sleep upon them until February 11th, 1892, when it commenced this suit. The question, therefore, remains whether the facts alleged do not disclose such *laches* on the part of the complainant as makes it proper for a court of equity

to withhold its aid. A decree in its favor would be, in effect, to hold that the complainant, without any reason or excuse therefor being shown, was entitled to tie the hands of the government (the government being passive and, therefore, consenting) and exclude from all the odd sections within what might prove to be the indemnity limits of its grant, all persons who might seek a settlement thereon for a period extending from the date of its grant, July 27, 1866, until the year 1888, without in any way indicating the definite location of its road—a period of more than twenty-one years—and that it could continue to wait until April 2, 1889, before filing in the office of the Commissioner of the General Land Office a map showing its definite location, and until December 31, 1891, before attempting to exercise its right of selection, and until February 11, 1892, before instituting suit to establish its claim to a piece of land falling within the indemnity limits of its grant, as fixed by the final and definite location of its road, as against one who settled upon it on the 2d day of September, 1885, and for which he was allowed by the officers of the local land office to file his declaratory statement on September 7, 1885, and which he was allowed by the officers of the Land Department to enter and pay for June 7, 1886, and for which the government issued to him its patent April 11, 1890.

The bill as amended shows that the section of the complainant's road opposite the land in controversy was constructed prior to the filing in the General Land Office of a map showing its definite location, but, so far

as appears, nothing whatever was done by the complainant tending to indicate the definite location of that section of the road until the year 1888, during which year it was constructed. The bill as amended does not show that this long delay of the complainant in indicating the definite location of that part of its road opposite the land in controversy was in any respect caused by any failure or neglect on the part of the Government or of any of its officers, nor does it show any excuse for waiting, after the construction of that portion of its road in 1888, until December 31, 1891, before making any attempt to select the piece of land in controversy, nor for waiting until February 11, 1892, before bringing this suit. The fact, as made to appear by the pleadings now before the Court, that the complainant actually constructed its road before filing with the Commissioner of the General Land Office a map showing its definite location, would seem to indicate quite clearly that the complainant treated the map of its general route there filed on the 3rd day of January, 1867, as its map of definite location. At all events, it was the business of the complainant to fix definitely the location of its road, and to indicate that line by a map filed in the General Land Office. Neither the Government nor any other company or individual could do so for the complainant. The delay and neglect in that regard was the delay and neglect of the complainant, and of nobody else. In this aspect of the case, it is unimportant that when Groeck settled upon the land on September 2, 1885, claiming the right to pre-empt it,

the land was not legally open to settlement because withdrawn from such settlement or sale for the benefit of the complainant Company. The fact remains that Groeck did enter upon it under an adverse claim to the complainant, and that his claim was recognized by the officers of the Land Department of the Government, and that, notwithstanding those facts, the complainant continued to sleep upon its rights for more than six and a half years before appealing to the Court for relief—a period considerably longer than that prescribed by the statute of California for the bringing of an action for the recovery of real property. (Code of Civil Procedure of California, Sections 318, 319, 343 and 738.) It is true that the *laches* of which the complainant was guilty prior to Groeck's settlement is no concern of his, and that if the Government was content, no third party has the right to complain, but certainly he is entitled to avail himself of such *laches* as occurred subsequent to the commencement of his adverse claim—a claim which existed uncontested for more than six and a half years. While the statutes of limitations applicable to actions at law do not apply to suits in equity, Courts of equity are governed by the analogy of such statutes. (Norris vs. Haggin, 136 U. S., 386.) “A Court of equity,” said Lord Camden, “has always refused its aid to stale demands where the party slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this Court into activity but conscience, good faith and reasonable diligence. Where these are wanting the Court is passive and does

nothing. Laches and neglect are always discountenanced; and therefore, from the beginning of this jurisdiction there was always a limitation to suits in this Court."

This doctrine has been repeatedly recognized and acted on by the Supreme Court. (*Curtner vs. United States*, 149 U. S., 676; *Speidel vs. Henrici*, 120 U. S., 377, and cases there cited.)

An order will be entered sustaining the plea with leave to the complainant, if it shall be so advised, to reply to the plea and take issue in respect to the matters of fact therein alleged, within twenty days from this date.

ROSS,

Circuit Judge.

[Endorsed]: No. 347. U. S. Circuit Court, Ninth Circuit, Southern District of California. *The Southern Pacific Railroad Co. vs. Otto Groeck, et al.* Opinion on Plea. Filed May 18, 1896. Wm. M. Van Dyke, Clerk.

In the Circuit Court of the United States, for the Southern District of California.

SOUTHERN PACIFIC RAILROAD
COMPANY,

vs.

OTTO GROECK, et al.

Opinion on Plea to Second Amended Bill of Complaint.

To the second amended bill of complaint, filed herein July 6, 1896, the defendants interposed a plea, which the complainant caused to be set down for argument, and which was, by the respective parties, submitted upon the same briefs theretofore filed upon the hearing of the plea to the first amended bill.

For the purpose of disposing of the plea so submitted, the Court must assume, without proof on either side, the facts to be as set out in the amended bill, where not controverted by the plea, and where so controverted or inconsistent, to accept as true the contradictory and inconsistent allegations of the plea, together with such additional facts as are therein set out. (Southern Pacific Railroad Company vs. Groeck, et al., 74 Fed. Rep., 585, and cases there cited.)

The case as now presented is substantially the same as when last under consideration. For the reasons given in the opinion then filed, and which is reported

in 74 Fed. Rep., 585, an order will be entered sustaining the plea, with leave to the complainant, if it be so advised, to reply to the plea and take issue in respect to the matters of fact therein alleged, within twenty days from this date.

ROSS,

Circuit Judge.

[Endorsed]: 347. U. S. Circuit Court, Southern District of California. The Southern Pacific Railroad Company vs. Otto Groeck, et al. Opinion on Plea to Second Amended Bill. Filed Jan. 6, 1897. Wm. M. Van Dyke, Clerk.

UNITED STATES OF AMERICA,

Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California.

THE SOUTHERN PACIFIC RAIL-
ROAD COMPANY,

Complainant,

vs.

OTTO GROECK and C. S. MER-
RILL, Jr.,

Defendants. }

In Equity.

No. 347.

Decree.

This cause having heretofore been argued and submitted to the Court upon the plea of defendants to the

second amended bill of complaint, and upon consideration thereof the Court having on the 6th day of January, 1897, being a day in the August term, A. D. 1897, of said Circuit Court of the United States for the Southern District of California, sustained said plea with leave to the complainant if it should be so advised, to reply to the plea and take issue in respect to the matters of fact therein alleged, within twenty (20) days, and the complainant having failed and refused so to reply to said plea, and thereafter in open court on this 28th day of June, 1897, being a day in the January term, A. D. 1897, of said Circuit Court of the United States for the Southern District of California, the Court having ordered said bill of complaint dismissed ;

Now therefore, it is ordered, adjudged and decreed that the said bill of complaint be and the same hereby is dismissed, and that defendants have and recover of and from complainant, their, defendants' costs taxed at \$38.50, and that execution issue therefor after sixty days from date hereof.

Los Angeles, California, June 28, 1897.

ROSS,
Circuit Judge.

Decree entered and recorded June 28th, 1897.

Wm. M. Van Dyke,
Clerk.

[Endorsed]: No. 347. U. S. Circuit Court, Ninth Circuit, Southern District of California. The Southern Pacific Railroad Company, Complainant, vs. Otto Groeck, et al., Defendants. Decree. Filed June 28, 1897. Wm. M. Van Dyke, Clerk.

*In the Circuit Court of the United States, Ninth Circuit,
Southern District of California.*

SOUTHERN PACIFIC RAILROAD COMPANY,	Plaintiff,	} No. 347. In Equity.
vs.		
OTTO GROECK and C. S. MER- RILL, Jr.,	Defendants.	

Petition for Allowance of Appeal and Supersedeas.

The plaintiff in the above entitled suit, conceiving itself aggrieved by the decree made and entered herein on June 28th, 1897, sustaining the defendants' plea to the plaintiff's second amended bill of complaint, and ordering the said bill dismissed at the plaintiff's costs taxed at \$38.50, hereby appeals from the said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assign-

ment of Errors filed herewith; and they pray that their appeal be allowed, and that a transcript of the record, proceedings and papers upon which said decree is made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner further prays that, upon its giving a good and sufficient bond to be approved by this Court, all proceedings in this cause and upon said decree may be stayed pending the said appeal.

WM. SINGER, JR.,
Attorney for the Plaintiff.

WM. F. HERRIN,
Counsel for the Plaintiff.

[Endorsed]: No. 347. U. S. Circuit Court, Ninth Circuit, Southern Dist. of California. Southern Pac. Railroad Co. vs. Otto Groeck, et al. Petition for Allowance of Appeal and Supersedeas. Filed Aug. 24, 1897. Wm. M. Van Dyke, Clerk. Wm. Singer, Jr., rooms 61-2, Union Trust Building, San Francisco, Cal., Atty. for Plaintiff.

*In the Circuit Court of the United States, Ninth Circuit,
Southern District of California.*

SOUTHERN PACIFIC RAILROAD COMPANY,	Plaintiff,	}	No. 347. In Equity.
vs.			
OTTO GROECK and C. S. MER- RILL, Jr.,	Defendants.	}	

Assignment of Errors.

The plaintiff, by its counsel and attorney, in connection with its petition on appeal herein, says that the decree in this cause is erroneous and against its just rights, in the following particulars:

I.

The Court erred (*a*) in sustaining the defendants' plea to the plaintiff's second amended bill of complaint, and (*b*) in ordering the said bill of complaint dismissed.

II.

The Court erred in deciding that the plaintiff's second amended bill of complaint discloses such laches on the part of the plaintiff as that a Court of equity should withhold its aid; and herein the Court erred particularly in deciding:

a. That the failure to complete the construction of its railroad from Huron to Alcalde until the year 1888, constituted such laches of the plaintiff; or

b. That the failure of the plaintiff to file a map of the definite location of its railroad, from Huron to Alcalde, with the Commissioner of the General Land Office, prior to April 2nd, 1889, constituted such laches of the plaintiff; or

c. That the failure of the plaintiff to select the lands in controversy prior to December 31st, 1891, constituted such laches of the plaintiff; or

d. That the failure of the plaintiff to bring this suit until February 11th, 1892, constituted such laches.

III.

The Court erred in deciding it to be unimportant that the land in suit was withdrawn from the public lands and reserved to satisfy the plaintiff's grant, at all the times when the defendant Groeck settled upon, filed for, and was permitted to make pre-emption entry of the same.

IV.

The Court erred in deciding that since the date of his settlement upon the lands in suit the defendant Groeck has had the right to complain, or to avail himself, of the plaintiff's neglect, (*a*) to construct its railroad from Huron to Alcalde prior to the year 1888, or

(*b*) to file a map of the definite location of its railroad from Huron to Alcalde, with the Commissioner of the General Land Office, prior to April 2nd, 1889, or (*c*) to select the lands in controversy prior to December 31st, 1891, or (*d*) to bring suit prior to February 11th, 1892.

V.

The Court erred in allowing costs of suit to the defendants against the plaintiff.

Wherefore the plaintiff (appellant) prays that the said decree be reversed, and the said Circuit Court be directed to overrule and deny the defendants' plea to the plaintiff's second amended bill of complaint.

WM. SINGER, JR.,
Attorney for the Plaintiff.

WM. F. HERRIN,
Counsel for the Plaintiff.

[Endorsed]: No. 347. U. S. Circuit Court, Ninth Circuit, Southern Dist. of California. Southern Pac. Railroad Co. vs. Otto Groeck, et al. Assignment of Errors. Filed Aug. 24, 1897. Wm. M. Van Dyke, Clerk. Wm. Singer, Jr., rooms 61-2, Union Trust Building, San Francisco, Cal., Atty. for Plaintiff.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

SOUTHERN PACIFIC RAILROAD COMPANY,	} Plaintiff,	No. 347.
vs.		
OTTO GROECK and C. S. MER- RILL, Jr.,	} Defendants. }	

Order Granting Appeal and Supersedeas.

Having considered the plaintiff's petition for the allowance of appeal and supersedeas from the decree made and entered herein on June 28th, 1897, and the assignment of errors filed therewith, on motion of Mr. Wm. Singer, Jr., of counsel for the plaintiff, the appeal is allowed as prayed, upon the plaintiff's giving a bond, to be approved by this Court, in the sum of \$500.00; which bond shall operate as a supersedeas from the date of its approval.

ROSS,
Circuit Judge.

[Endorsed]: No. 347. U. S. Circuit Court, Ninth Circuit, Southern Dist. of California. Southern Pac. Railroad Co. vs. Otto Groeck, et al. Order Granting Appeal and Supersedeas. Filed August 24, 1897. Wm. M. Van Dyke, Clerk. Wm. Singer, Jr., Rooms 61-2, Union Trust Building, San Francisco, Cal., Attorney for Plaintiff.

*In the Circuit Court of the United States, Ninth
Circuit, Southern District of California.*

SOUTHERN PACIFIC RAILROAD COMPANY,	Plaintiff,	}	No. 347. In Equity.
vs.			
OTTO GROECK and C. S. MER- RILL, Jr.,	Defendants.	}	

Bond on Appeal.

We, John D. Bicknell and William Banning, each of Los Angeles, California, are held and firmly bound unto Otto Groeck and C. S. Merrill, Jr., the above named defendants, in the sum of \$500.00, to be paid to them, their executors or administrators; for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

The Southern Pacific Railroad Company, plaintiff above named, has been allowed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and a supersedeas, from the decree entered in the above entitled suit on June 28th, 1897; and the condition of this obligation is, that if the plaintiff Company shall prosecute its said appeal to effect, and answer the costs taxed in the decree appealed from, together with all damages, interest and costs of such appeal and super-

sedeas if it fails to make the said appeal good, then this obligation shall be void—otherwise to remain in full force.

Dated, signed and sealed on August 23d, 1897.

JOHN D. BICKNELL. (Seal.)

WILLIAM BANNING. (Seal.)

State of California,)
County of Los Angeles.) ss.

John D. Bicknell and William Banning being duly sworn, each for himself says: I am one of the sureties to the foregoing bond, and subscribed my name thereto. I am a resident of and freeholder within the Southern District of California, and am worth the sum of \$500.00, over and above all my just debts and liabilities, in property situated in said District which is not exempt from execution.

JOHN D. BICKNELL.

WILLIAM BANNING.

Subscribed and sworn to before me on August 23rd, 1897.

(Seal.)

R. W. DARBY,

Notary Public in and for Los Angeles Co., State of Cal.

Approved August 24th, 1897.

ROSS,

Circuit Judge.

[Endorsed]: No. 347. U. S. Circuit Court, Ninth Circuit, Southern Dist. of California. Southern Pac.

Railroad Co. vs. Otto Groeck, et al. Bond. Filed Aug. 24, 1897. Wm. M. Van Dyke, Clerk. Wm. Singer, Jr., Rooms 61-2, Union Trust Building, San Francisco, Cal., Atty. for Plaintiff.

*In the Circuit Court of the United States, Ninth Circuit,
Southern District of California.*

SOUTHERN PACIFIC RAILROAD COMPANY,	Plaintiff,	} No. 347. In Equity.
vs.		
OTTO GROECK and C. S. MER- RILL, Jr.,	Defendants. }	

Stipulation and Order as to Printing of Transcript.

To save the expense of copying papers and proceedings which are not necessary to a full hearing of the appeal herein, it is agreed that the following papers and documents shall be deemed to constitute a complete record of the above entitled case; and that no other papers need be copied into the transcript of record on appeal:

Plaintiff's second amended bill of complaint (filed on July 6th, 1896); the defendants' plea thereto; the opinion filed on May 18th, 1896; the opinion filed on Janu-

ary 6th, 1897; the decree entered June 28th, 1897; the plaintiff's petition for allowance of appeal and supersedeas; the plaintiff's assignment of errors; the order granting the appeal and supersedeas; the bond on appeal; this stipulation, and such order as may be made upon it; and the citation which may be issued herein.

WM. SINGER, JR.,

Attorney for the Plaintiff.

W. B. WALLACE,

Attorney for the Defendants.

It is ordered that a transcript of the record in the above entitled suit be made in accordance with the foregoing stipulation, and that the clerk of this Court forward such transcript, duly authenticated, to the United States Circuit Court of Appeals for the Ninth Circuit.

ROSS,

Circuit Judge.

[Endorsed]: No. 347. In the U. S. Circuit Court, Ninth Circuit, Southern District of California. Southern Pacific Railroad Co. vs. Otto Groeck, et al. Stipulation and Order. Filed Aug. 24, 1897. Wm. M. Van Dyke, Clerk. Wm. Singer, Jr., rooms 61-2, Union Trust Building, San Francisco, Cal., Atty. for Defts.

*In the Circuit Court of the United States of America, of
the Ninth Judicial Circuit, in and for the Southern
District of California.*

THE SOUTHERN PACIFIC RAIL- ROAD COMPANY,	}	No. 347.
Complainant,		
vs.	}	
OTTO GROECK and C. S. MER- RILL, Jr.,		
Defendants.		

Clerk's Certificate to Transcript.

I, Wm. M. Van Dyke, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, do hereby certify the foregoing forty-one typewritten pages, numbered from 1 to 41, inclusive, and comprised in one volume, to be a full, true and correct copy of the following papers in the above and therein entitled cause, viz: Plaintiff's second amended bill of complaint, filed on July 6th, 1896; the defendants' plea thereto; the opinion filed on May 18th, 1896; the opinion filed on January 6th, 1897; the decree entered June 28th, 1897; the plaintiff's petition for allowance of appeal and supersedeas; the plaintiff's assignment of errors; the order granting the appeal and supersedeas; the bond on appeal; and the stipulation and order made upon it,

filed on August 24th, 1897; and that the same together, under and pursuant to said last mentioned stipulation and order, constitute the transcript of the record on appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, in said cause.

I do further certify that the cost of the foregoing record is \$21.²⁰/₁₀₀, and that the amount thereof has been paid me by the Southern Pacific Railroad Company, the appellant in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, this 11th day of September, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twenty-second.

(Seal.)

WM. M. VAN DYKE,

Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California.

[Endorsed]: No. 398. United States Circuit Court of Appeals for the Ninth Circuit. The Southern Pacific Railroad Company, Appellants, vs. Otto Groeck

and C. S. Merrill, Jr., Appellees. Transcript of Record. Appeal from the Circuit Court of the United States for the Southern District of California.

Filed Sept. 14, 1897.

FRANK D. MONCKTON,
Clerk.

By Meredith Sawyer,
Deputy Clerk.